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No. 97-1779

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ALAN RICHARDS, *et al.*,

Petitioners,

—v.—

LLOYD'S OF LONDON, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT LLOYD'S IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent Lloyd's, sued herein as Lloyd's of London, an unincorporated association, and The Corporation of Lloyd's, a/k/a The Society of Lloyd's, a/k/a The Society and Council of Lloyd's, is not a publicly held corporation, has no parent corporation, and has no subsidiaries that are not wholly owned.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Lloyd's respectfully submits this opposition to the petition for a writ of certiorari (the "Petition," cited herein as "Pet.") seeking review of a judgment of the United States Court of Appeals for the Ninth Circuit that requires Petitioners to adjudicate their claims against Lloyd's in the English courts, pursuant to English law, as they contractually committed to do.

STATEMENT OF THE CASE

Petitioners are individual underwriting members ("Names") of the international insurance market regulated by Respondent Lloyd's pursuant to Acts of the British Parliament. Petitioners have asserted claims against Lloyd's under, inter alia, the registration and anti-fraud provisions of the federal securities laws. There has been no determination — and Lloyd's vigorously disputes — that Petitioners' membership of, or underwriting in, the Lloyd's market involves the purchase or sale of a "security" within the meaning of the federal securities statutes. Nevertheless, Petitioners argue that the anti-waiver provisions of those statutes automatically void their contractual agreement to litigate disputes relating to their participation in the Lloyd's market in the English courts, pursuant to English law (the "Choice Clause").

Less than two months ago, this Court declined, for the fifth time, to review a decision of a United States Court of Appeals enforcing the Choice Clause to dismiss claims under the federal securities laws. Haynsworth v. Corporation of Lloyd's, 121 F.3d 956 (5th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1513 (1998).[1] The petition in Haynsworth, like its

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[1] The Court previously declined review in Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), mandamus denied, ___ U.S. ___, 117 S. Ct. 2497 (1997); Bonny v. Society of

Footnote continued

predecessors, made the same argument advanced by Petitioners here: that parties to an international forum selection agreement may avoid their contractual obligation to litigate in the chosen forum by the simple expedient of asserting claims under the federal securities laws.

This Court rejected that argument long ago in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). Following its earlier decision in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), this Court in Scherk enforced an agreement requiring arbitration of the parties' dispute in Paris, even though there was no assurance that the arbitrators would apply the federal securities laws to the plaintiff's claim of fraud, and even though plaintiff contended that the anti-waiver provisions contained in the federal securities laws precluded enforcement.

Following Bremen and Scherk, the Ninth Circuit, on rehearing en banc in this case, enforced the Choice Clause and affirmed the district court's dismissal of the case for improper venue. Six other Courts of Appeals have done the same.[2] Like the Ninth Circuit, each of the appellate courts that has enforced the Choice Clause has found that Names can obtain substantial and meaningful redress for their alleged injuries from the English courts.

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Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

[2] In addition to the cases cited supra at note 1, the Sixth Circuit affirmed a district court's dismissal of state securities claims pursuant to the Choice Clause in Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995).

Supreme Court review is also unnecessary with respect to the Ninth Circuit's ruling that Petitioners had failed to demonstrate that the Choice Clause was unenforceable as the product of fraud. This Court's decisions in Scherk and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), clearly establish that generalized allegations of fraud in the inducement of the underlying agreements between the Petitioners and Lloyd's are insufficient, as a matter of law, to invalidate the Choice Clause. Four other Courts of Appeals, including the Fifth Circuit in Haynsworth, have rejected virtually identical claims that the Choice Clause was unenforceable as the product of fraud.[3]

Factual Background

Respondent Lloyd's is an English entity incorporated by, and granted regulatory powers pursuant to, Acts of the British Parliament. See Appendix for Petitioners ("Pet. App.") 3a. Specifically, pursuant to Lloyd's Act 1982, Lloyd's, through its governing body the Council of Lloyd's, is charged with the authority to regulate an English insurance market, and the participants in that market (including Petitioners), who reside in over seventy nations. Lloyd's regulatory functions must be exercised in accordance with the Lloyd's Act 1982 and the Insurance Companies Act 1982, both English statutes. Lloyd's is further subject to direct supervision by Her Majesty's Treasury.[4] Lloyd's is not an insurer, and does not underwrite or insure risks,

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[3] Haynsworth, 121 F.3d at 963-65; Bonny, 3 F.3d at 159-60; Tufts v. Corporation of Lloyd's, 128 F.3d 793 (2d Cir. 1997), aff'g per curiam 981 F. Supp. 808 (S.D.N.Y. 1996); Riley, 969 F.2d at 960.

[4] Lloyd's was subject to the supervision of the British Department of Trade and Industry (the "DTI") until January 5, 1998, when these supervisory functions were transferred to Her Majesty's Treasury.

accept premiums, or share in the profits or losses of those who underwrite risks in the Lloyd's market. Pet. App. 3a, 28a.

Petitioners are Names resident in the U.S., each of whom acts as an individual insurer in the Lloyd's market. They, and not Lloyd's, are paid premiums by policyholders, are contractually liable to policyholders for the insurance risks they have underwritten, and earn profits or incur losses on their underwriting. As required by English law, individual Names, such as Petitioners, are personally liable to policyholders on the risks they insure to the full extent of their personal wealth. Pet. App. 3a-4a. However, under English law (see Lloyd's Act 1982 § 8(1)), a Name's liability is several, not joint; a Name bears no responsibility for the underwriting obligations of other Names, and has no right to share in the underwriting profits of other Names. Id.; see also Pet. App. 4a.

English statutes require that for an individual to underwrite insurance in the United Kingdom he must become a member of Lloyd's. Insurance Companies Act 1982 §§ 2(1)-(2). Lloyd's establishes regulatory requirements, financial and otherwise, that prospective Names must meet to qualify for underwriting membership in the Lloyd's market. Before admission to the market, Names must travel to London to meet with a representative of the Council of Lloyd's to acknowledge, among other things, their awareness of the risks of underwriting, including the unlimited nature of their personal liability. Pet. App. 3a.

Names are resident in over seventy countries worldwide. In order to become or remain an underwriting member of the Lloyd's market, each Name, wherever resident, must enter into a simple two-page agreement with Lloyd's called the "General Undertaking." Pet. App. 3a. Each of the Petitioners has executed the General Undertaking. In so doing, Petitioners expressly agreed to comply with all English statutes relating to their underwriting in the Lloyd's market and with all regulations promulgated by the Council of Lloyd's pursuant to the regulatory authority granted by Parliament. Respondent's Appendix ("Resp. App.") R1 (General Undertaking executed by Petitioner Alan Richards) ¶ 1.

Consistent with their agreement to comply with English insurance statutes and to subject themselves to Lloyd's regulatory authority, Petitioners agreed in the General Undertaking to adjudicate any disputes they might have relating to their membership of or underwriting in the Lloyd's market in English courts pursuant to English law. Specifically, paragraph 2.1 of the General Undertaking states:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

Resp. App. R2. Paragraph 2.2 (id.) states:

> Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to

> as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

Petitioners do not contend that the Choice Clause is unclear or inconspicuous, nor do they dispute that it covers the claims asserted in this action.

Procedural History

District Court Proceedings. Petitioners commenced the Richards action in the Southern District of California on August 1, 1994, asserting federal and state statutory claims and state common-law claims against Lloyd's. The statutory claims included four causes of action under the registration and anti-fraud provisions of the Securities Act of 1933 (the "'33 Act") and the Securities Exchange Act of 1934 (the "'34 Act"). Petitioners also asserted claims under RICO, 18 U.S.C. § 1961 et seq. While Petitioners acknowledged that they acted as individual insurers in the Lloyd's market, they also claimed that their membership of and underwriting in the Lloyd's market in London involved the purchase or sale of a security, thereby entitling them to the remedies provided by federal and state securities laws. Lloyd's vigorously disputes that any aspect of a Name's participation in the Lloyd's market constitutes a security.

Lloyd's moved to dismiss the complaint,[5] pursuant to Fed. R. Civ. P. 12(b)(3), on the ground that the Choice Clause made venue in the U.S. courts improper, and on the alternative ground of forum non conveniens.[6] In response, Petitioners contended that enforcement of the Choice Clause would be unreasonable (i) because the Choice Clause had been procured by fraud or overreaching, and (ii) in light of the anti-waiver provisions of the federal securities laws, 15 U.S.C. §§ 77n, 78cc(a). The district court rejected these contentions and held that the Choice Clause made venue in the U.S. courts improper. Petitioners appealed the dismissal of the action.[7]

Ninth Circuit. A panel of the Ninth Circuit unanimously affirmed the district court's ruling that the Choice Clause had not

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5 The Norton case was filed after Lloyd's moved to dismiss the complaint in Richards. The two actions were consolidated by order dated November 24, 1995.

6 Approximately half of the Petitioners have since accepted Lloyd's offer of settlement under its Reconstruction & Renewal Plan, pursuant to which they released Lloyd's and certain other parties from all claims relating to their participation in the Lloyd's market. Two hundred eighty-nine of the Petitioners have filed stipulations dismissing their claims against Lloyd's with prejudice, as the settlement agreement requires. Approximately ninety of the Petitioners have not yet done so.

7 The Securities and Exchange Commission (the "SEC") filed a brief in the Ninth Circuit as amicus curiae supporting Petitioners' contention that the Choice Clause should not be enforced in light of the anti-waiver provisions. The SEC took no position, however, as to the merits of Petitioners' claims, including their allegation that their participation in the Lloyd's market involved the purchase or sale of a security. Pet. App. 40a.

been fraudulently procured, and that the Choice Clause required the dismissal of plaintiffs' state law claims. See Pet. App. 42a. However, the panel divided as to whether the Choice Clause was enforceable with respect to federal securities law claims.

The panel majority (Noonan, J., with Wiggins, J.) reversed the district court's dismissal of the federal securities law claims. Although the majority merely assumed, without deciding, that some aspect of a Name's involvement in the Lloyd's market fell within the definition of a "security" under the '33 Act or the '34 Act, it concluded that the anti-waiver provisions of those statutes pose an automatic bar to enforcement of an otherwise-valid international forum agreement. Pet. App. 32a-33a. In the alternative, the panel held that even if the anti-waiver provisions did not pose an absolute bar to enforcement of the Choice Clause, enforcement would violate U.S. public policy because English remedies were inadequate. Id. at 40a.

The dissent (Goodwin, J.) would have affirmed the district court's ruling that the Choice Clause was enforceable to dismiss the complaints in their entirety. Specifically, the dissent recognized that this Court's decision in Scherk controlled the outcome because in Scherk an international forum agreement was enforced, based on Bremen, over the plaintiff's contention that the agreement was void under the anti-waiver provisions of the '34 Act.

Lloyd's petitioned the panel for rehearing and alternatively suggested that the Ninth Circuit grant rehearing en banc.[8] The Ninth Circuit granted rehearing en banc and heard oral argument en banc on October 24, 1997.

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[8] The DTI, on behalf of the Government of the United Kingdom of Great Britain and Northern Ireland (the "British Government") made an amicus curiae submission in support of Lloyd's petition. Resp. App. R4. The British Government

Footnote continued

On February 3, 1998, the Ninth Circuit en banc withdrew the panel opinion and affirmed the district court's dismissal of the action by a vote of eight to three. The en banc majority (Goodwin, J.) held that:

> We follow our six sister circuits that have ruled to enforce the choice clauses . . . because we apply Scherk and because English law provides the Names with sufficient protection.

Pet. App. 9a (citations omitted). In so holding, the majority rejected the contention that the anti-waiver provisions automatically prohibit enforcement of a forum clause in an international commercial agreement simply because the federal securities laws are alleged to apply. Id. at 7a. The majority likewise rejected the contention that the Choice Clause violated public policy because the remedies available in the English courts are not identical to those provided by the federal securities laws. Id. at 11a-13a. In addition, the en banc majority followed Roby, as well as existing Ninth Circuit precedent, to affirm dismissal of the RICO claims. Id. (citing Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1366 (2d Cir.), cert. denied, 510 U.S. 945 (1993), and Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768-79 (9th Cir. 1991)).[9]

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explained that the panel majority's decision was "detrimental to [the] regulatory regime approved by Parliament . . . ." Id. at R5.

[9] Although Petitioners mention the dismissal of the RICO claims in their statement of the questions presented, Pet. i, the Petition does not otherwise discuss the Ninth Circuit's affirmance of the dismissal of the RICO claims, or present any reasons why that ruling was incorrect.

The dissent (Thomas, J., with Pregerson and Hawkins, JJ.) agreed with the view of the withdrawn panel opinion that the anti-waiver provisions constituted a "per se rule" against enforcement of international forum selection clauses when the federal securities laws are alleged to apply. Pet. App. 16a.

The en banc Ninth Circuit unanimously affirmed the district court's rejection of Petitioners' assertion that the Choice Clause was void as the product of fraud.[10] Pet. App. 14a. Finding Prima Paint controlling on the question of when a forum selection clause may be avoided on grounds of fraud, the en banc Ninth Circuit held that Petitioners' allegations did not relate specifically to the inclusion of the Choice Clause in the General Undertaking, but instead related to the underlying contract as a whole. Id.

On May 4, 1998, Petitioners submitted the Petition to this Court.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant review of the Ninth Circuit's en banc decision. The issues presented by the Petition have already definitively been resolved by this Court in Scherk and Prima Paint. The appellate courts have consistently applied Scherk and Prima Paint to reject the same arguments advanced here by Petitioners.

In Scherk, this Court rejected the contention that a commitment contained in an international agreement to adjudicate claims relating to the agreement in a foreign tribunal may be vitiated simply by alleging that the federal securities laws apply to

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[10] The panel had unanimously affirmed this aspect of the district court's opinion. Pet. App. 32a. The dissent from the en banc opinion does not address this issue.

such claims. The Ninth Circuit properly found that Scherk "resolve[d] the question whether public policy reasons allow the Names to escape their 'solemn agreement' to adjudicate their claims in England under English law." Pet. App. 11a. Six other appellate courts have reached the same result, and this Court has declined to review five of these decisions, most recently in Haynsworth.[11]

Nor is the Ninth Circuit's ruling inconsistent with other decisions of this Court, as Petitioners contend. See Pet. 16-21 (citing Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989), Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)). In none of these cases was there any uncertainty or dispute as to whether, in the absence of a forum agreement, the federal statutes invoked by the plaintiff would have applied to claims arising from an international agreement. Only in Scherk did this Court confront such uncertainty. The cases relied upon by Petitioners are thus inapposite and in no way modify or limit Scherk's holding that, in the international context, the anti-waiver provisions do not bar enforcement of the parties' agreement to litigate in a foreign forum simply because the purchase of a "security" is alleged.

There is also no compelling basis for this Court to review the Ninth Circuit's rejection of Petitioners' claim that their assent to the Choice Clause was procured by fraud. Scherk and Prima Paint make clear that Petitioners' allegations of fraud are insufficient, as a matter of law, to invalidate the Choice Clause. The Ninth Circuit's decision on this issue is consistent with that of the four other courts of appeals that have addressed, and

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[11] The plaintiffs in Shell did not petition this Court for review of the Sixth Circuit's ruling enforcing the Choice Clause.

rejected, identical allegations of fraud in the procurement of the Choice Clause. See supra note 3. This Court recently declined to review the Fifth Circuit's rejection of identical allegations in Haynsworth.

I. THE NINTH CIRCUIT PROPERLY HELD THAT PLAINTIFFS COULD NOT AVOID THE CHOICE CLAUSE MERELY BY ALLEGING CLAIMS UNDER THE FEDERAL SECURITIES LAWS

A. The Choice Clause Is Presumptively Enforceable Under Bremen And Scherk

In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), this Court firmly established that forum selection clauses contained in international agreements merit a strong presumption of enforceability. Accordingly, such clauses must be "specifically [enforced] unless the party resisting enforcement could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Id. at 15. Just two years after deciding Bremen, this Court held in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), that the principles set forth in Bremen also governed the enforceability of a "truly international" forum agreement in a case in which the plaintiff alleged that the federal securities laws applied to the dispute. 417 U.S. at 509, 514-15.

The strong presumption of enforceability derives not only from a general respect for contract but from the specific needs of international commerce. As the Court stated in Bremen:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9. In Scherk, the Court further recognized that

> [a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

The presumption of enforceability accorded to an international forum agreement applies with even greater force in this case, because the General Undertaking is not just a commercial agreement. By executing the General Undertaking, Petitioners agreed to comply with both the English statutes, and the rules and regulations promulgated by Lloyd's, that govern their ability to conduct underwriting business in an international insurance market located and operating in England. The Choice Clause is critical to Lloyd's ability to regulate the marketplace — which includes Names from over seventy different countries — effectively and consistently. As an English court has explained:

> The clear and simple purpose of this agreement, aptly called an undertaking, was to ensure that on his becoming a Name [defendant] became subject to the regulatory regime of Lloyd's. The clauses governing choice of law and venue were ancillary to that object.

Society of Lloyd's v. Clementson, [1995] LRLR 307 (C.A. Nov. 10, 1994) (LEXIS, Enggen Library, Cases File). See also Resp. App. R4.

Claims by Names arising from their underwriting or membership in Lloyd's "aim[] at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." Hirsch v. Oakeley Vaughan Underwriting Ltd., No. 89-2563, slip op. at 7 (5th Cir. May 31, 1990), cert. denied, 498 U.S. 981 (1990). It would be completely

anomalous to allow U.S. courts applying U.S. law to adjudicate disputes between U.S. Names and Lloyd's when the regulatory relationship at the heart of the dispute was created by, and is governed by, English law.

B. Scherk Is Controlling And Requires Enforcement Of The Choice Clause

Petitioners claim that the "anti-waiver" provisions make the Bremen presumption of enforceability inapplicable to the Choice Clause because these provisions represent a "legislative command[]" that international forum selection agreements may not be enforced in cases alleging securities transactions. Pet. 16-18. That argument, however, was precisely the one considered and rejected by this Court in Scherk, which held that anti-waiver provisions did not preclude dismissal of claims asserted under section 10(b) of the '34 Act in favor of the contractually chosen forum in Paris. 417 U.S. at 509, 514-15. The Ninth Circuit thus properly decided to "enforce the choice clause[] . . . . because we apply Scherk. . . ." Pet. App. 9a. Accord Haynsworth, 121 F.3d at 969 (stating that Scherk is "directly on point").

Petitioners advance several arguments in an attempt to distinguish Scherk. None of these arguments has any merit.

1. The Anti-Waiver Provisions Do Not Bar Enforcement Of An International Forum Agreement

Petitioners argue that the courts must view the anti-waiver provisions as an absolute statutory bar to enforcement of the Choice Clause because the courts must assume the truth of their contention that the securities laws apply to their membership of and/or underwriting in the Lloyd's market. In Scherk, however, this Court emphatically rejected this reasoning.

The Court expressly declined in Scherk to "reach, or imply any opinion as to, the question whether the acquisition of

Scherk's business was a security transaction," 417 U.S. at 514 n.8, even though it left undisturbed the Seventh Circuit's denial of a motion to dismiss for failure to state a claim under section 10(b) of the '34 Act. See Alberto-Culver Co. v. Scherk, 484 F.2d 611, 615 (7th Cir. 1973), rev'd, 417 U.S. 506 (1974). Although the Court had previously held that the anti-waiver provisions barred enforcement of an arbitration clause in a purely domestic securities case, Wilko v. Swan, 346 U.S. 427 (1953), it found that the international nature of the agreement in Scherk "involve[d] considerations and policies significantly different than those found controlling in Wilko." 417 U.S. at 515. In particular, the Court noted that:

> In Wilko . . . there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.

Id. at 515-16 (emphasis supplied).[12] Because of this uncertainty, inherent in any transaction that "touch[es] two or more countries," id. at 516, the reasoning underlying Wilko's holding that the anti-waiver provisions barred enforcement of a forum agreement in a domestic securities case was "simply inapposite."

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[12] Wilko has since been overruled. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

Id. at 517. The Court thus held that the anti-waiver provisions did not pose a statutory bar to enforcement of the forum clause.

As the Ninth Circuit properly recognized, the Court's reasoning in Scherk applies with equal force here. There is considerable uncertainty in this case, as there was in Scherk, regarding the application of the federal securities laws to Petitioners' participation in the Lloyd's market. Pet. App. 7a n.2. Consequently, as in Scherk, the anti-waiver provisions do not pose a statutory bar to enforcement of the Choice Clause.

Petitioners contend that Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), is controlling here because Bremen and Scherk do not apply "when a statute governs 'the immediate issue before the Court.'" Pet. 16 (citing Stewart, 487 U.S. at 28). Stewart, however, has no relevance to this case. In Stewart, defendants had moved to transfer a diversity case, pursuant to 28 U.S.C. § 1404, to a New York federal court, the exclusive forum for dispute resolution designated by the parties. The Eleventh Circuit had held that the motion should be granted in light of the enforceability of the forum agreement under Bremen. Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1070-71 (11th Cir. 1987) (en banc), aff'd, 487 U.S. 22 (1988). This Court affirmed, but for different reasons. Since the motion to transfer was made pursuant to section 1404, the Court held that all the criteria set forth in that statute must be considered in deciding whether to order transfer. 487 U.S. at 23. While the Court held that the existence of an otherwise enforceable forum selection agreement should "figure centrally" in that analysis, it was not dispositive. Id.

In Stewart, there was no question that 28 U.S.C. § 1404 "govern[ed] the immediate issue before the Court": whether to grant a motion to transfer a purely domestic case from one federal court to another. By contrast, there is considerable uncertainty here about whether the federal securities laws apply — even in the absence of the Choice Clause — to the international agreements between the Names and Lloyd's. Stewart therefore

cannot be read, as Petitioners contend, to make the anti-waiver provisions "govern" the enforceability of the Choice Clause.[13]

2. The Choice Clause Is A "Truly International" Agreement

In a further effort to avoid the application of Bremen and Scherk, Petitioners attempt to characterize their relationship with Lloyd's as "predominately domestic" rather than "truly international." Pet. 21. The Ninth Circuit properly found, however, that "[e]ntering into the Lloyd's market . . . is plainly an international transaction," because:

> [t]he Names signed a contract with English entities to participate in an English insurance market and flew to England to consummate the transaction. That the Names received solicitations in the United States does not somehow alter these facts.

Pet. App. 8a.[14]

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[13] The other cases cited by Petitioners for the proposition that the "clear language" of the anti-waiver provisions precludes "judge-made exceptions," Pet. 16-17, are equally inapposite. Each of these cases involved a question of statutory interpretation in which there was no dispute that the relevant statute applied

[14] The Fifth Circuit, presented with the same argument by Names, characterized it as "disingenuous," because it is:

> sufficiently obvious that an agreement is "international" when it involves an American Name's underwriting international insurance policies in an English market pooling resources with other Names from over eighty countries and

Footnote continued

Petitioners' claim that their agreement with Lloyd's is not "truly international" flies in the face of both Bremen and Scherk. In Bremen, this Court reversed a lower court decision holding that a forum selection agreement requiring litigation in England should not be enforced because U.S. contacts predominated over any English contacts. 407 U.S. at 7-8. Likewise, in Scherk, the Court found the agreement to be "truly international" even though the foreign defendant had come to the United States to negotiate the essential terms of the agreement with the American plaintiff. See Alberto-Culver Co., 484 F.2d at 613-14. The relevant inquiry is not which country has the most contacts, but whether the transaction "touch[es] two or more countries, each with its own set of substantive laws and conflicts of laws rules." Scherk, 417 U.S. at 516.

Thus, Petitioners' effort to obscure the international nature of their participation in the Lloyd's market by characterizing their ROTA interviews in London as a "trivial" foreign contact (Pet. 8, 21) completely misses the point. It defies reason to suggest that an agreement between the regulator of an English insurance market and those who underwrite insurance in that market — and subject themselves to a regulatory regime

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> all the while explicitly agreeing to be bound by English law.

Haynsworth v. Corporation of Lloyd's, 121 F.3d 956, 967 (5th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1513 (1998). Accord Bonny v. Society of Lloyd's, 3 F.3d 156, 159 n.9 (7th Cir. 1993) ("There is no question that the transaction involved here is truly international."), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1362-63 (2d Cir.) cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 957 (10th Cir.) ("[The] agreement is truly international."), cert. denied, 506 U.S. 1021 (1992).

established by English insurance statutes in doing so — has only an "insignificant and attenuated" relationship with England. See Pet. 21 (citing Pet. App. 19a).

3. Scherk Does Not Require That The Chosen Forum Will Enforce The Federal Securities Laws

Petitioners assert that this Court's holding in Scherk was predicated on a conclusion that the federal securities laws would be applied by the arbitrators in Paris. Pet. 18-19. Based on this reading of Scherk, they argue that the anti-waiver provisions preclude enforcement of any forum selection agreement that chooses foreign law or does not otherwise assure the application of the federal securities laws in the chosen forum. Id. at 19.

Petitioners' argument, however, misreads Scherk. The choice of law clause requiring the Parisian arbitrators to apply Illinois law to any disputes, 417 U.S. at 508, did not assure that the arbitrators would apply the federal securities laws, or even consider the '34 Act claims, as the dissent pointedly noted. Id. at 532-33 & n.11 ("Even if the arbitration court reads this clause to require application of Rule 10b-5's standards, [the] victory would be Pyrrhic.") (Douglas, J., dissenting). The majority clearly contemplated the possibility that the arbitrators would not apply the federal securities laws:

> This case . . . provides no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere.

Id. at 517 n.11 (emphasis supplied).[15] Petitioners' argument would place on defendants the burden to litigate the question of whether a "security" was offered or sold before they could enforce a forum agreement — defeating the very purpose of the agreement, which is to confine litigation on merits issues to the chosen forum.

Petitioners also misread Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987), and Rodriguez de Quijas v. Shearson Am. Express, Inc., 490 U.S. 477 (1989), as limiting the application of Scherk to cases in which it is clear that the chosen forum will apply the federal securities laws. Pet. 18-20. McMahon and Rodriguez, unlike Scherk, did not involve an international agreement in which there was uncertainty concerning the applicable law in the absence of a forum selection and/or choice of law agreement. Rather, these cases, like Wilko, involved purely domestic transactions to which the federal securities laws concededly applied. In McMahon, the question before the Court was whether to extend Wilko's ban on arbitration of '33 Act claims to '34 Act claims; in Rodriguez, the Court overruled Wilko altogether. The Court's consideration of the extent to which Wilko should apply in the domestic context had no bearing or impact on this Court's prior decision, in

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15 Likewise, in Bremen, this Court rejected the "parochial" view that U.S. law must govern all disputes arising out of international agreements. 407 U.S. at 9. The contract at issue in Bremen did not contain an express choice of law provision, but this Court recognized that the choice of an English forum was essentially a choice of English law as well, as it was "reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law." Id. at 13 n.15. Although this Court explicitly recognized that application of English law would be outcome determinative and yield results different from those that would obtain under U.S. law (id. at 8 & n.8), it nonetheless enforced the forum agreement.

Scherk, that Wilko simply did not apply in the international context.

Petitioners' reliance on dicta in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), is equally misplaced. Pet. 22-23. Mitsubishi enforced an international arbitration clause in a case involving anti-trust counterclaims, overruling a line of lower court decisions holding antitrust claims to be non-arbitrable. 473 U.S. at 640. The parties had agreed that, despite a provision requiring the Japanese arbitrators to apply Swiss law, counterclaims alleging violations of the Sherman Act would also be submitted for arbitration. The following footnote was therefore pure dictum:

> [I]n the event the choice of forum and choice of law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for anti-trust violations we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n.19.

By its terms, the Mitsubishi dictum is limited to the antitrust context, and even if read broadly does not outweigh Scherk, as the Ninth Circuit recognized. Pet. App. 11a-12a. Because there is no common law analogue for antitrust claims, an agreement that chc se both a foreign forum and foreign law could, like a release, deprive a plaintiff of any remedy for anti-competitive conduct. See Haynsworth, 121 F.3d at 968. By executing the Choice Clause, however, Petitioners have not been left without remedies for alleged fraud by Lloyd's.[16] Like the

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[16] The Court's concern that causes of action providing redress for anti-competitive conduct might be unavailable in foreign jurisdictions is reflected by the cases cited in the Mitsubishi footnote to support the "prospective waiver" dictum. These

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Ninth Circuit, the five other courts of appeal that have considered whether the Mitsubishi dictum precludes enforcement of the Choice Clause have held that it does not. Haynsworth, 121 F.3d at 968; Shell, 55 F.3d at 1230-31; Bonny, 3 F.3d at 160; Roby, 996 F.2d at 1364-65; Riley, 969 F.2d at 959-60.

Petitioners fare no better in their reliance on Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), to support their contention that the federal courts will not enforce forum agreements which have the effect of "waiving" statutory claims. Pet. 22-23. In Vimar, this Court overruled a long line of lower court precedents that had voided forum agreements under the Carriage of Goods by Sea Act ("COGSA"), and enforced forum selection and choice of law provisions requiring arbitration in Japan. COGSA is the implementation of an international treaty intended to eliminate uncertainty regarding the law applicable to disputes arising from international bills of lading by creating uniform rights and obligations amongst the signatory nations. Vimar therefore neither displaces nor modifies Bremen and Scherk, which recognize the needs of parties to international transactions to eliminate in advance any uncertainty as to the applicable law. Pet. App. 12a n.5 ("Vimar, however, does not extend to the instant case as Vimar involved COGSA, a statute designed to address international transactions."). See also Haynsworth, 121 F.3d at 968-69 ("COGSA . . . [embodies] an international scheme the very nature of which would be frustrated by permitting parties to opt out of it.").

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cases do not involve forum selection or choice of law clauses but instead involve general releases of future claims that permitted the released party to engage in anti-competitive conduct with impunity. See, e.g., Reidel's Inc. v. General Elec. Co., 498 F.2d 95 (5th Cir. 1974).

In sum, United States public policy does not preclude parties to an international transaction from choosing to resolve their disputes in foreign courts and/or pursuant to foreign law. As the Fifth Circuit aptly noted:

> It defies reason to suggest that a plaintiff may circumvent forum selection . . . clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading.

Haynsworth, 121 F.3d at 969 (quoting Roby, 996 F.2d at 1360) (emphasis in original).

C. Petitioners Have Adequate Remedies For Their Claims In The English Courts

The Ninth Circuit correctly determined that the Names have adequate recourse against Lloyd's — and other participants in the Lloyd's market — in England. Pet. App. 12a-13a. The six other appellate courts that have enforced the Choice Clause reached the same conclusion, recognizing that Names have significant remedies against Lloyd's for fraud in the English courts. Haynsworth, 121 F.3d at 969; Allen, 94 F.3d at 929; Shell, 55 F.3d at 1231; Bonny, 3 F.3d at 161; Roby, 996 F.2d at 1365-66; Riley, 969 F.2d at 958.

The Ninth Circuit properly rejected the contention that any specific differences between the remedies available to Names in England and the remedies that the federal securities statutes might provide prevent enforcement of the Choice Clause. Pet.

App. 13a. See also Haynsworth, 121 F.3d at 969-70. Any other conclusion would be inconsistent with both Bremen and Scherk, as it would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . .'" Scherk, 417 U.S. at 519 (citing Bremen, 407 U.S. at 9). As the Fifth Circuit aptly noted:

> The view that every foreign forum's remedies must duplicate those available under American law would render all forum selection clauses worthless and would severely hinder Americans' ability to participate in international commerce.

Haynsworth, 121 F.3d at 969.

II. THE NINTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE WAS NOT PROCURED BY FRAUD

A. The Ninth Circuit Properly Applied Prima Paint And Scherk

Petitioners also attack the Choice Clause as the product of fraud. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), and Scherk, this Court held that forum agreements are unenforceable on grounds of "fraud and overreaching" only "if the inclusion of that clause in the contract was the product of fraud or coercion." Scherk, 417 U.S. at 519 n.14 (emphasis in original) (citing Prima Paint, 388 U.S. at 404 & n.11). As this Court recognized in Scherk, this "does not mean that anytime a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable." Scherk, 417 U.S. at 519 n.14.

The Ninth Circuit correctly held that "simply alleging that one was duped into signing the contract is not enough." Pet. App. 14a. That is all Petitioners alleged here:

> The Names never allege . . . that Lloyd's misled them as to the legal effect of the choice clauses. Nor do they allege that Lloyd's fraudulently inserted the clauses without their knowledge. Accordingly, we view the allegations made by the Names as going only to the contract as a whole, with no allegations going to the inclusion of the choice clauses themselves.

Id.

Like the Ninth Circuit, the Second, Fifth, Seventh, and Tenth Circuits have rejected identical claims of fraud in the inducement of the Choice Clause. See Tufts v. Corporation of Lloyd's, 128 F.3d 793 (2d Cir. 1997), aff'g per curiam 981 F. Supp. 808, 813 (S.D.N.Y. 1996); Haynsworth, 121 F.3d at 963; Bonny, 3 F.3d at 160 n.10; Riley, 969 F.2d at 960.

B. The Ninth Circuit's Application Of Prima Paint Is Consistent With Moseley

Contrary to Petitioners' contention, the Ninth Circuit's application of Prima Paint is fully consistent with this Court's earlier decision in Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963). Moseley does not hold that generalized assertions that a forum selection agreement was part of a broader fraud concerning the underlying contract suffice to invalidate the forum agreement. To the contrary, Moseley simply holds that allegations of fraud in the inducement of a forum agreement must be assessed by the court in which the suit is brought prior to deciding whether to enforce the agreement.

In Moseley, the petitioner was party to several contracts with the respondent that contained clauses requiring arbitration in New York. After the respondent commenced arbitration, petitioner sued in a Georgia federal court seeking to enjoin the arbitration, asserting that, among other things, both the contracts and the arbitration provisions themselves had been procured by

fraud. The district court found arbitration improper on statutory grounds, but stated, without making any assessment of the allegations of fraud, that an additional reason for enjoining the arbitration was that the arbitration clause "if induced by fraud . . . would be vitiated. . . ." Id. at 169 (emphasis supplied).

Declining to reach the statutory issue, the Court, after twice noting that "no request had been made [in the federal action] for the enforcement of the arbitration agreement," id. at 170, remanded the case to the district court to decide whether the arbitration clause had been procured by fraud before addressing any other issues. Id. at 171. Moseley thus provides no support for Petitioners' assertion that a forum selection clause may properly be voided without "allegations or evidence of deception as to the existence or legal effect of the clause." Pet. 26.

Unlike the district court in Moseley, the district court in this case has already properly determined, before enforcing the parties' agreement to litigate in England, that Petitioners' allegations and "evidence" concerning fraud in the procurement of the Choice Clause did not meet the standard set by this Court in Prima Paint.[17] See Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 668 (2d Cir. 1997) (holding that Prima Paint and Moseley require party seeking to avoid a forum selection clause to do more than allege that the "clause was a part of the overall scheme to defraud"; a party must also prove "some nexus between the alleged fraud or misrepresentation and the arbitration clause in particular").

Petitioners erroneously assert that C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette, 912 F.2d 1563

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[17] The district court reviewed voluminous documents submitted by Petitioners in support of their assertion that the Choice Clause was the product of fraud and found that they had "no relevance" to that assertion. Pet. App. 64a, 68a n.20.

(6th Cir. 1990), creates a split of appellate authority as to the proper application of Prima Paint. Pet. 26. The Sixth Circuit in C.B.S. Employees did not hold that allegations that a forum clause was part of a fraudulent scheme sufficed, by themselves, to invalidate the clause. Rather, the Sixth Circuit merely remanded the case to the district court to determine whether, when plaintiffs had alleged fraud in the procurement of both the underlying contract and the arbitration clause, plaintiffs could substantiate any claims of fraud specific to the arbitration clause.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

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